In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 478

WEST POINT WHOLESALE GROCERY COMPANY,
Appellant,

vs.

THE CITY OF OPELIKA, ALABAMA,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF ALABAMA.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

REPORTS OF OPINIONS BELOW.

The Supreme Court of Alabama did not render an opinion in this case. The opinion of the Court of Appeals of Alabama is reported in 87 So. 2d 667 (1956). A copy of that opinion is attached hereto as Appendix "A." The Lee Circuit Court of Alabama, the court of first instance, did not render an opinion in this case.

JURISDICTIONAL GROUNDS.

1. This is an appeal from a decision of the Court of Appeals of Alabama. The appellant herein brought suit against The City of Opelika, Alabama, to recover monies paid to that City pursuant to Section 130(a) of Ordinance

No. 101-53 as amended by Ordinance No. 103-53 on the ground that Section 130(a) was unconstitutional as being in conflict with the provisions of both the Federal and Alabama Constitutions. The ordinance in controversy levies a flat sum license tax on persons engaged in the wholesale grocery business who dispose of groceries at wholesale in Opelika which groceries are transported from a point without Opelika.

2. The decision of the Court of Appeals of Alabama was handed down on the 21st day of February, 1956. A motion for rehearing was denied by the Court of Appeals on April 3, 1956. Within the time permitted by Alabama law appellant petitioned for a writ of certiorari to the Supreme Court of Alabama. The Supreme Court of Alabama denied the writ of certiorari and dismissed the petition on May 24, 1956. A Notice of Appeal to this Court was filed by appellant with the Clerk of the Court of Appeals of Alabama on August 9, 1956.

3. The jurisdiction of this Court upon appeal is conferred by 28 U. S. C. A. § 1257(2). Appellant challenges the validity of an ordinance of the City of Opelika, Alabama, "a statute of a State" within the meaning of 28 U. S. C. A. § 1257(2), on the ground that as applied to appellant's activities it is repugnant to the Constitution of the United States, and the decision of the highest State court to which an appeal could have been taken was in favor of validity.

4. Cases believed to sustain the jurisdiction of this Court on appeal include:

King Manufacturing Co. v. City Council of Augusta, 277 U. S. 100 (1928); *Jamison v. Texas*, 318 U. S. 413

(1943); *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70 (1947); *Poulos v. New Hampshire*, 345 U. S. 395 (1953); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157 (1954); *Sullivan v. Texas*, 207 U. S. 416 (1908); *American Railway Express Co. v. Levee*, 263 U. S. 19 (1923); *Western Union Telegraph Co. v. Priester*, 276 U. S. 252 (1928); *Western Union Telegraph Co. v. Crovo*, 220 U. S. 364 (1911); *Norfolk & Suburban Turnpike Co. v. Commonwealth of Virginia*, 225 U. S. 264 (1912).

5. Section 130(a) of Ordinance No. 101-53 as amended by Ordinance No. 103-53, the ordinance involved, is set out below. This ordinance is not found in any official reports.

> "130(a) TRANSIENT OR ITINER. WHOLESALE GROCERS: Each person, firm or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama which are transported from a point without the City of Opelika, Alabama to a point within the City of Opelika, Alabama, Annual Only ..... $250.00."

Attached hereto as Appendix "B" are Sections d, 82, 130 and 130(a) of Ordinance No. 101-53 as amended by Ordinance No. 103-53. Section d provides penalties for non-compliance with the ordinance. Section 82 provides for the taxation of Opelika wholesale merchants. Section 130 provides for the taxation of persons disposing of goods other than wholesale grocery products in Opelika which are transported from a point without Opelika. These three sections, while not directly attacked in this appeal, are necessary for a complete consideration of the issues.

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

1. Whether Section 130(a) of Ordinance No 103-53 of the City of Opelika, Alabama, levying a $250.00 annual flat sum license tax for 1953 upon each person, firm or corporation which unloaded or delivered groceries at wholesale in the City of Opelika, Alabama, which groceries were transported from a point *without* Opelika, violated the Commerce Clause of the United States Constitution (U. S. Const. art. I, § 8, cl. 3), and the Equal Protection and Due Process Clauses of the United States Constitution (U. S. Const. amend. XIV, § 1) as applied to appellant.

2. Whether the above Section 130(a) as so applied violated the said Commerce, Equal Protection and Due Process Clauses, particularly since another provision of the same Ordinance (being Section 82 thereof) levied an annual license tax upon each wholesale merchant which unloaded or delivered groceries at wholesale in the City of Opelika, Alabama, which groceries were transported from a point *within* Opelika, at a graduated amount apportioned according to the gross receipts derived from such local business.

3. Whether the foregoing Section 130(a) as so applied violated the said Equal Protection and Due Process Clauses particularly since another section of the same Ordinance (being section 130 thereof) levied an annual license tax of only $100.00 upon itinerant merchants conducting the same operation as appellant except for the selling of merchandise at retail rather than at wholesale.

STATEMENT OF THE CASE.

This is a suit brought against the City of Opelika, Alabama, to recover monies paid to the City pursuant to the provisions of Section 130(a) of Ordinance No. 101-53 as amended by Ordinance No. 103-53 on the ground that Section 130(a) is in conflict with the United States Constitution. Appellant was required to pay the flat sum license tax levied by this section together with an issuance fee of 50¢ under penalty of being adjudged in violation of the law and subject to a fine and imprisonment as is provided in Section d of Ordinance 101-53 (App. "B").

Without filing an answer or other responsive pleading the appellee demurred to the complaint, which demurrer was sustained. A non-suit was entered and an appeal taken to the Alabama Court of Appeals. The Alabama Court of Appeals affirmed the decision of the Court of first instance and over-ruled an application for re-hearing. Appellant then petitioned the Alabama Supreme Court for a writ of certiorari directed to the Alabama Court of Appeals. The Alabama Supreme Court denied the writ of certiorari and dismissed the petition.

Most important in the context of this proceeding is the undebatable proposition that by demurring to the complaint appellee has admitted the truth of all well pleaded facts. *Long v. Long*, 255 Ala. 353, 51 So. 2d 533; *Watkins v. Reinhart*, 243 Ala. 243, 9 So. 2d 113; *Montgomery v. Smith*, 226 Ala. 91, 145 So. 822; *Hanover Fire Insurance Co. v. Street*, 228 Ala. 677, 154 So. 816.

The complaint states that during all of 1953 appellant was "a non-resident of the State of Alabama, being a corporation organized and existing under the laws of the State of Georgia and was, during said time, engaged in the wholesale grocery business, and from time to time, during

said period, sold [and] delivered in interstate commerce certain of its groceries to retail merchants, located and doing business in said City of Opelika, that plaintiff had no office, storeroom or place of business whatsoever within the State of Alabama, that plaintiff had no inventory or store of goods within the State of Alabama for the purpose of making deliveries in the State of Alabama or for any other purpose, but that such sales were purely interstate sales made upon orders given to plaintiff's salesman and representative upon his solicitation of such orders from said retail merchants, which orders were transmitted or delivered by said salesman or representative to plaintiff, at its place of business in the City of West Point, in the State of Georgia, where the orders were accepted, whereupon the groceries so ordered were loaded upon plaintiff's trucks at its place of business in said City of West Point in the State of Georgia, and unloaded at said retail merchants' places of business at the end of a continuous movement in interstate commerce from plaintiff's said place of business in the State of Georgia to the purchasers' place of business in the City of Opelika."

Thus, appellant, a corporation of a State other than Alabama, has absolutely no contact with Opelika, Alabama other than the solicitation of orders in Opelika through salesmen or representatives, and the transportation of groceries from outside Alabama to Opelika, Alabama. The decision below in this case subjects appellant, by reason of such interstate activities, to a flat sum license tax. This alone is repugnant to the Commerce Clause of the Federal Constitution as it is a direct tax on interstate commerce.

It is significant also that merchants who dispose of groceries at wholesale in Opelika, which groceries are transported from a point within Opelika, are not subject to

the flat sum $250.00 license tax imposed on appellant. Their tax is graduated according to gross receipts derived from such local business. This is discrimination in its boldest form.

In addition, persons disposing of products other than wholesale groceries, whose activities are otherwise identically the same as appellant's, are taxed at only $100.00. This classification is unreasonable, unjustified, and contrary to the United States Constitution.

RAISING THE FEDERAL QUESTION BELOW.

The Constitutional points which appellant raises on this appeal were initially raised by the pleadings. Appellant attacked the validity of the Ordinance in question in its complaint as being repugnant to the Commerce Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution. The court of first instance sustained a demurrer to the complaint.

The fact that the Federal questions were adequately and properly raised was recognized by the State Court of Appeals in its opinion.

> "The legality of the tax provided for under Section 130 (a) of the Ordinance is challenged on the ground (1) that it imposes an undue burden on inter-state commerce in violation of Article 1, Section 8, Clause 3, of the Federal Constitution, and (2) that it is arbitrary, unreasonable and discriminatory in that it differentiates between interstate commerce and intrastate commerce. * * *"

This Court will accept the recognition by the State Court that the Federal questions were properly raised in that court. *Charlestown Federal Savings & Loan Ass'n v. Alderson*, 324 U. S. 182 (1945).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

Appellant has attacked the validity of the Ordinance involved herein on the grounds that it is repugnant to the Commerce Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution.

This Court has repeatedly held that all flat sum license taxes necessarily discriminate against interstate commerce and are therefore invalid. This Court has itself recognized that such taxes have a substantial effect on interstate commerce. In *Nippert v. City of Richmond*, 327 U. S. 416 (1946), a case involving a flat sum license tax, this Court said:

> "* * * the Richmond tax imposes substantial excluding and discriminatory effects of its own. As has been said, the small operator particularly and more especially the casual or occasional one from out of the state will find the tax not only burdensome but prohibitive, with the result that the commerce is stopped before it is begun."

In *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389 (1952) this Court struck down a flat sum license tax on the privilege of soliciting business in interstate commerce, declaring that a State could not carve out from the integral processes of interstate commerce the incident of solicitation. The rationale of the *Memphis* case is applicable to the instant case. The City of Opelika has sought to carve out of the integral economic process of interstate commerce the incident of disposing of groceries at wholesale within the City of Opelika. It thereby has placed a substantial barrier against the flow of interstate commerce.

When the flat sum license tax is a municipal tax, as it is here, its exclusionary effects upon interstate commerce are multiplied. Potentially the burden of such a tax could

be multiplied by the number of municipalities within the State and could effectively stop all interstate commerce. In the *Nippert* case this Court stated:

> "The potential excluding effects * * * are magnified many times by recalling that the tax is a municipal tax not one imposed by the State legislature for uniform application throughout the State. * * *"

The license tax here in question flagrantly discriminates against interstate commerce for the further reason that a local wholesole grocer delivering from a warehouse in Opelika is not subjected to the same flat sum $250.00 tax imposed on appellant. The local merchants' tax is graduated according to gross receipts derived from local business (App. "B," Section 82). Thus, a local wholesale grocer with gross receipts up to $100,000 from deliveries in Opelika is required to pay a tax of only $35.00. In contrast, appellant, to deliver even $1.00 worth of groceries in Opelika must pay a $250.00 tax.

Such an advance toll, exacted when the grocer cannot determine whether he can obtain enough Opelika business to justify entering into the market, effectively stops interstate commerce and deprives the grocer of his right to do business in Opelika. "Interstate commerce can hardly survive in so hostile an atmosphere." *Best & Co., Inc. v. Maxwell*, 311 U. S. 454 (1940).

The license taxes of the City of Opelika not only place a direct burden on interstate commerce and discriminate against foreign wholesale grocers, they also place foreign merchants who are wholesale grocers in one classification taxed at $250.00 per year, and foreign merchants who are not wholesale grocers in another classification taxed at $100.00 per year (App. "B," Section 130). There is no basis for this classification. It is unreasonable and therefore invalid.

The exclusionary effects of the Opelika tax are so great as to impair appellant's right to engage in the wholesale grocery business in interstate commerce. This is a substantial right which the City of Opelika may not contravene.

The decision below sustaining the validity of Section 130(a) should not be permitted to stand in open defiance of the existing pronouncements of this Court. This tax affects not only appellant but all other wholesale grocers who dispose of goods within Opelika from a point without Opelika. If the decision below stands unchallenged an open invitation is extended to every other municipality in Alabama and for that matter every municipality in the United States to impose a similar tax. To permit such a practice would completely throttle interstate commerce in favor of local interests and create an area within which a local businessman could exert complete monopolistic control to the exclusion of out of State dealers.

THIS CASE IS WITHIN THE JURISDICTIONAL PROVISIONS RELIED ON AND THE CASES CITED TO SUSTAIN JURISDICTION.

This appeal is taken pursuant to 28 U. S. C. A. § 1257 (2). That section confers appellate jurisdiction on this Court to review final judgments rendered by the highest court of a State in which a decision could be had when there is drawn in question the validity of a statute of the State on the grounds of its being repugnant to the Constitution, and the decision of the State court is in favor of validity.

There can be no question that a final judgment is involved in this appeal, as the court of first instance by sustaining the demurrers held that no cause of action is stated and thus appellant had no standing in court. This

is most certainly a final determination of appellant's rights.

This Court has many times held that a "statute" within the ambit of 28 U. S. C. A. § 1257 (2) means more than a State law enacted by the general legislative authority, and that it encompasses municipal ordinances, municipalities merely being political sub-divisions of the State. *King Manufacturing Co. vs. City Council of Augusta,* 277 U. S. 100 (1928); *Jamison v. Texas,* 318 U. S. 413 (1943); *Independent Warehouses, Inc. v. Scheele,* 331 U. S. 70 (1947); *Poulos v. New Hampshire,* 345 U. S. 395 (1953).

As previously noted the Supreme Court of Alabama denied the writ of certiorari to the Alabama Court of Appeals and dismissed the petition. The general rule is that where the order of the higher court amounts to an affirmance of the intermediate court decision, the appeal is to be taken from the higher court ruling. *Norfolk & Suburban Turnpike Co. v. Commonwealth of Virginia,* 225 U. S. 264 (1912). In the instant case, however, the ruling of the Alabama Supreme Court which denied the writ and dismissed the petition did not amount to an affirmance on the merits. It was a refusal to hear and determine the merits.

In *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U. S. 157 (1954) the highest State court noted "refused." The appellant took two appeals, one from the highest court, the other from the intermediate court. The Supreme Court dismissed the appeal from the highest court and heard the case on the appeal from the intermediate court. Similar cases are: *Sullivan v. Texas,* 207 U. S. 416 (1908); and *American Railway Express Co. v. Levee,* 263 U. S. 19 (1923).

It is clear, therefore, that the Alabama Supreme Court refused to hear the case on the merits. Accordingly, pursuant to existing Supreme Court authority the appeal is from the judgment of the Alabama Court of Appeals.

CONCLUSION.

Appellant respectfully suggests that this appeal brings before the Court Federal questions under the Constitution which are far reaching and important in terms of legal principles and practical impact on the taxation of interstate activities and the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral arguments for the resolution.

Respectfully submitted,

M. R. SCHLESINGER,
Attorney for Appellant.

Of Counsel:

N. D. DENSON,
Opelika, Alabama,

TOM B. SLADE,
Columbus, Georgia.

APPENDIX "A."

Opinion of the Alabama Court of Appeals.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE ALABAMA COURT OF APPEALS
OCTOBER TERM, 1955-56.

5 Div. 448

WEST POINT WHOLESALE GROCERY COMPANY

v.

CITY OF OPELIKA

APPEAL FROM LEE CIRCUIT COURT

PRICE, JUDGE

This suit was brought by appellant, West Point Wholesale Grocery Company, a corporation, seeking to recover monies paid as license fees under an ordinance of the City of Opelika.

Defendant's demurrers to the complaint were sustained and plaintiff took a non-suit and perfected this appeal. Title 7, Section 819, Code 1940.

The complaint alleges:

"1. The Plaintiff claims of the Defendant, City of Opelika, a municipal corporation organized and existing under the laws of the State of Alabama, the sum of Two Hundred Fifty and 50/100 ($250.00) Dollars, for that during the period, towit: January 1st, 1953, to and including the date of the filing of this Complaint, Plaintiff was, and is now, a non-resident of the State of Alabama, being a corporation organized and existing under the laws of the State of Georgia and was, during said time, engaged in the wholesale grocery business, and from time to time,

during said period, sold and delivered in interstate commerce certain of its groceries to retail merchants, located and doing business in said City of Opelika, that Plaintiff had no office, storeroom or place of business whatsoever within the State of Alabama, that Plaintiff had no inventory or store of goods within the State of Alabama [for the purpose of making deliveries in the State of Alabama][1] or for any other purpose, but that such sales were purely interstate sales made upon orders given to Plaintiff's salesman and representative upon his solicitation of such orders from said retail merchants, which orders were transmitted or delivered by said salesman or representative to Plaintiff, at its place of business in the City of West Point, in the State of Georgia, where the orders were accepted, whereupon the groceries so ordered were loaded upon Plaintiff's trucks at its place of business in said City of West Point in the State of Georgia, and unloaded at said retail merchants' place of business at the end of a continuous movement in interstate commerce from Plaintiff's said place of business in the State of Georgia to the purchasers' place of business in the City of Opelika.

Plaintiff further alleges that during said period, to-wit: from January 1st, 1953, to and including the day on which this Complaint is filed, the Defendant, said City of Opelika, had in full force and effect an ordinance, enacted by its Board of Commissioners, which fixed and prescribed a 'License Schedule' for said City of Opelika, Alabama, being 'An ordinance to fix and prescribe the rates for license or privilege taxes for trades, vocations, professions, and other businesses conducted within the City of Opelika,

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[1] The language in brackets does not appear in the opinion. Appellant has taken the liberty of inserting it, in conformity with the complaint, as appellant believes it was inadvertently overlooked and is a typographical error.

Alabama,' which ordinance imposed a tax upon wholesale merchants as will appear from said 'schedule' which in words and figures, pertinent here, is as follows, to-wit:

"'82. MERCHANTS, WHOLESALE:

Where a gross annual business is:

$100,000.00 and less	35.00
Over $100,000.00 and less than $200,000.00	50.00
$200,000.00 and less than $500,000.00	75.00
$500,000.00 and less than $1,000,000.00	100.00
$1,000,000.00 and less than $2,000,000.00	200.00
$2,000,000.00 and over	250.00

And in addition thereto, one-sixteenth (1/16) of one percent (1%) on the first $500,000.00 gross receipts plus one-twentieth (1/20) of one percent (1%) on the next $500,000.00 gross receipts plus one-fortieth (1/40) of one percent (1%) on all gross receipts over one million dollars ($1,000,000.00)'

"And Plaintiff further alleges that during said period said Defendant City had in full force and effect an ordinance, enacted by its Board of Commissioners, which fixed and prescribed a 'License Schedule,' being 'An ordinance to fix and prescribe the rates for license or privilege taxes for trades, vocations, professions, and other businesses conducted within the City of Opelika, Alabama,' which ordinance imposed a tax upon 'Transient or Itinerant' merchants, as will appear from said 'Schedule' which in words and figures, pertinent here, is as follows, to-wit:

"'130. TRANSIENT OR ITINERANT:

Each person, firm, corporation or motor transportation company who unloads, delivers, distributes or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only ..... $100.00'

"Plaintiff further alleges that by an ordinance which was enacted by said Board of Commissioners and which became effective on, to-wit: January 21st, 1953, said license schedule was amended, said amendment as advertised and published in Opelika Daily News, a newspaper published in said City, in its issue of January 21st, 1953, being as follows, to-wit:

"ORDINANCE No. 103-53

"An Ordinance to Amend Ordinance No. 101-53 entitled City License Schedule for 1953.

"Be it ordained by the Board of Commissioners of the City of Opelika, Alabama, as follows:

"1. That Ordinance No. 101-53 of the City of Opelika, Alabama, entitled City License Schedule for 1953, be amended by adding thereto sub-section 130(a), as hereinafter set forth, and by amending sub-section 130 thereof to read as follows:

"130. TRANSIENT OR ITINERANT:

"Each person, firm, corporation or motor transportation company, except persons, firms or corporations engaged in the wholesale grocery business delivering, distributing or disposing of groceries at wholesale, who unloads, delivers, distributes, or disposes, of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only ---------- $100.00.

"130(a) TRANSIENT OR ITINERANT-WHOLESALE GROCERS:

"Each person, firm, or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from

a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only ..... $250.00.

"2. This ordinance shall become effective immediately after the publication.

"Adopted and Approved this the 20th day of January 1953.

"(s) EALON M. LAMBERT
President of the Board of Commissioners of the City of Opelika, Alabama.

"Attest:
W. F. Pearson
City Clerk
(Adv. 21).

"Plaintiff further alleges that the above quoted provisions are some of many provisions in said ordinance, constituting the 'City License Schedule' adopted by said City of Opelika.

"Plaintiff further alleges that said City of Opelika, upon the passage of said amended ordinance, demanded that Plaintiff pay said license tax of $250.00 together with an issuance fee of 50¢; under penalty of being adjudged in violation of law and subject, as shown by that section of 'City License Schedule for 1953' then in force and effect, to fine and imprisonment, which section is in words and figures as follows:

" 'd. PENALTIES:

It shall be unlawful for any person, firm, or corporation, to engage in any of the businesses or vocations for which a license may be required without first having procured a license therefor, and any violation hereof shall constitute a criminal offense and shall be punishable by fine not to exceed one hundred

($100.00) dollars for each offense and by imprisonment not to exceed thirty days and not less than the amount of the licenses, either or both at the discretion of the Court trying the same, and each day when such business or vocation is conducted without such license shall constitute a separate offense.'

"Plaintiff further alleges that it paid said license tax of $250.00, and issuance fee of 50 cents, so demanded by said Defendant City.

"Plaintiff further alleges that the aforesaid deliveries and unloadings by it from its trucks were of groceries in interstate commerce at the end of continuous interstate movements from Plaintiff's place of business in the City of West Point in the State of Georgia to the places of business of the purchasing retail merchants in said City of Opelika, Alabama, and that said ordinance of said City of Opelika, Alabama, and the license tax levied and applied to this Plaintiff thereunder constitute an undue burden upon such interstate commerce.

"Plaintiff further alleges that the aforesaid ordinance of said City of Opelika, Alabama, and the license tax levied thereunder, are arbitrary, unreasonable and discriminatory, in that they differentiate between interstate commerce and intrastate commerce, setting up everyone 'who unloads, delivers, distributes or disposes of any goods, wares, merchandise or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama,' as one classification taxed in one way, namely, a flat-sum, and those who unload, deliver, distribute, or dispose of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, other than goods, wares, merchandise,

or produce transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, as a separate classification taxed in a different way, namely, apportioned on the basis of gross receipts.

"Plaintiff further alleges that said ordinance of said City of Opelika, Alabama, and the license tax levied thereunder, are arbitrary, unreasonable and discriminatory, in that they differentiate among interstate merchants properly in the same class as Plaintiff, said ordinance setting up everyone 'engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama,' as one classification taxed at $250.00 per year, * * *[2] and setting up everyone 'except persons, firms, or corporations engaged in the wholesale grocery business delivering, distributing, or disposing of groceries at wholesale, who unloads, delivers, distributes, or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise, or produce was transported from a point without the City of Opelika, Ala-

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[2] The following language, which appears in both the official and published opinion, has been omitted above because it is the belief of Appellant that such language was inadvertently included, the same not appearing as part of the complaint:

"and setting up everyone 'except, firms, or corporations engaged in the whole grocery business dellvering, distributing, or disposing of groceries at wholesale, who unloads, delivers, distributes, or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise, or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama,' as one classification taxed at $250.00 per year,"

bama, to a point within the City of Opelika, Alabama,' as a separate classification taxed at $100.00 per year.

"Plaintiff further alleges that the said ordinance of said City of Opelika, Alabama, and the flat-sum license tax levied and applied to this Plaintiff thereunder, are arbitrary, unreasonable and discriminatory, in that they are not uniform in their burden upon those in the class set up by said ordinance of which Plaintiff is a member, said ordinance taxing everyone 'engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama,' at $250.00 per year without any apportionment upon any basis whatsoever.

"Plaintiff further alleges that said ordinance of said City of Opelika, Alabama, and the license tax levied thereunder, as applied to this Plaintiff are arbitrary, unreasonable and discriminatory, creating a burden upon interstate commerce, in that they discriminate between solicitation of business in interstate commerce and solicitation of business in intrastate commerce, said ordinance taxing 'each person, firm or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama,' at a flat sum of $250.00 per year, while a person, firm, or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, other than groceries transported from a point without the City of Opelika, Alabama, to a point within the

City of Opelika, Alabama, is taxed on the basis of its gross receipts, and may pay a much smaller tax even though its gross sales are the same as those of the person, firm or corporation engaged in interstate commerce who must pay the flat-sum of $250.00.

"Plaintiff further alleges that because of such discrimination as set forth above, the said ordinance of said City of Opelika, Alabama, and the flat-sum license tax levied and applied to this Plaintiff thereunder, deprived Plaintiff of its property without due process of law.

"Plaintiff further alleges that for all of the facts and reasons hereinabove set forth said ordinance of said City of Opelika, Alabama, and the license tax levied thereunder, violate and are contrary and repugnant to the Constitution of the United States and the Constitution of Alabama, and in particular Article I, Section 8, Clause 3, and Article IV, Section 2 of the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States, and Sections 1 and 35 of the Constitution of Alabama, all of which results in said ordinance and tax being illegal and void.

"Plaintiff further alleges that on or about February 15, 1953, it paid to said City of Opelika the sum of $250.00 and an issuance fee of 50 cents demanded and exacted of it under and by virtue of said ordinance, namely: License Schedule 130(a), and Plaintiff avers that said sums of $250.00 and 50 cents were paid by Plaintiff to said Defendant City of Opelika, under mistake of law or fact and that said City of Opelika, now retains the same, and Plaintiff therefore claims of said Defendant City of Opelika the sum of $250.50 for money on, to-wit: February 15th, 1953, had and received by said Defendant City of Opelika, which sum of money, to-wit: $250.50 with the interest thereon, is still unpaid."

The legality of the tax provided for under quoted Section 130(a) of the ordinance is challenged on the ground (1) that it imposes an undue burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the Federal Constitution, and (2) that it is arbitrary, unreasonable and discriminatory in that it differentiates between interstate and intrastate commerce; differentiates between interstate merchants properly in the same class as appellant, because that said classification 130(a) fixes a license fee of $250.00 while classification 130 fixes a fee of $100.00; a flat sum license tax is levied without regard to the amount of business each year; discriminates between itinerant wholesale grocery merchants and local wholesale merchants in that the local merchants are taxed on a graduated gross receipts basis while itinerant wholesale grocers are required to pay a flat-sum license.

The ordinance is essentially identical with those previously considered and held valid in *Sanford v. City of Clanton,* 31 Ala. App. 253, 15 So. 2d 303; cert. den. 244 Ala. 671, 15 So. 2d 309; *Sanford Service Company v. City of Andalusia,* 36 Ala. App. 74, 55 So. 2d 854; cert. den. 256 Ala. 507, 55 So. 2d 856; *City of Enterprise v. Fleming,* 240 Ala. 460, 199 So. 691, 692.

The ordinance applies equally to deliveries of wholesale groceries in the City of Opelika, regardless of whether the transportation began within or without the State, therefore, defendant's contention that it differentiates between intrastate and interstate commerce is without merit. *Sanford v. City of Clanton, supra; Sanford Service Co. v. City of Andalusia, supra.*

The basis of classification is a reasonable one and applies equally to all within the class, *City of Enterprise v. Fleming, supra; Woco Pop Co. of Montgomery v. City*

of Montgomery, 219 Ala. 73, 121 So. 64; *American Bakeries Co. v. City of Huntsville,* 232 Ala. 612, 168 So. 880, and it is not discriminatory because a different tax was required of itinerant persons unloading, delivering, distributing or disposing of goods, wares, merchandise, or produce, other than wholesale groceries.

There is no merit in appellant's contention that the tax is discriminatory because it imposes upon the local wholesale merchant a graduated scale gross receipts tax for the privilege of engaging in local business, while appellant must pay a fixed-sum license tax. "It is well settled that a schedule of licenses may be prescribed for an itinerant person, firm or corporation different from that prescribed for one having an established place of business within the municipality." *American Bakeries v. City of Opelika,* 229 Ala., 388, 157 So. 206; *American Bakeries Co. v. City of Huntsville,* 232 Ala. 612, 168 So. 880.

Likewise, we find no merit in appellant's contention that all fixed-sum license taxes necessarily discriminate against interstate commerce. As was said by Judge Simpson in *Sanford v. City of Clanton, supra* "* * * the principle has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for purchase of goods to be shipped interstate."

We are of the opinion the complaint does not allege sufficient facts to support the conclusions of the pleader as to the charge of unlawful discrimination against appellant or to show that the requirement that appellant pay the license fees constitutes an illegal burden on interstate commerce. The demurrer was properly sustained.

The judgment of the circuit court is affirmed.

AFFIRMED.

APPENDIX "B."

Excerpts From City of Opelika License Schedule.

Ordinance No. 101-53 as amended by
Ordinance No. 103-53.

§ d. PENALTIES:

It shall be unlawful for any person, firm or corporation or agent of such person, firm or corporation, to engage in any of the businesses or vocations for which a license may be required without first having procured a license therefor, and any violation hereof shall constitute a criminal offense and shall be punishable by fine not to exceed one hundred ($100.00) dollars for each offense and by imprisonment not to exceed thirty days and not less than the amount of the licenses, either or both at the discretion of the Court trying the same, and each day when such business or vocation is conducted without such license shall constitute a separate offense.

§ 82. MERCHANT, WHOLESALE:

Where a gross annual business is:

$100,000.00 and less	$ 35.00
Over $100,000.00 and less than $200,000.00	$ 50.00
$200,000.00 and less than $500,000.00	$ 75.00
$500,000.00 and less than $1,000,000.00	$100.00
$1,000,000.00 and less than $2,000,000.00	$200.00
$2,000,000.00 and over	$250.00

And in addition thereto, one-sixteenth (1/16) of one percent (1%) on the first $500,000.00 gross receipts, plus one-twentieth (1/20) of one percent (1%) on the next $500,000. gross receipts plus one-fortieth (1/40) of one percent (1%) on all gross receipts over one million dollars ($1,000,000.00).

§ 130. TRANSIENT OR ITINERANT:

Each person, firm, corporation or motor transportation company, except persons, firms or corporations engaged in the wholesale grocery business delivering, distributing or disposing of groceries at wholesale, who unloads, delivers, distributes, or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama to a point within the City of Opelika, Alabama, Annual Only $100.00

§ 130(a). TRANSIENT OR ITINER. WHOLESALE GROCERS:

Each person, firm or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama which are transported from a point without the City of Opelika, Alabama to a point within the City of Opelika, Alabama, Annual only $250.00

APPENDIX "C."

Order of the Alabama Court of Appeals.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE ALABAMA COURT OF APPEALS
OCTOBER TERM, 1955-56.

5 Div. 448

WEST POINT WHOLESALE GROCERY COMPANY

v.

CITY OF OPELIKA

APPEAL FROM LEE CIRCUIT COURT

February 21, 1956

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant and N. D. Denson, surety on the appeal bond, pay the costs of appeal of this Court and of the Circuit Court.